

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF WEST VIRGINIA

JOSE OSCAR NINO,

Plaintiff,

v.

//

CIVIL ACTION NO. 1:07CV56
(Judge Keeley)

BUREAU OF PRISONS, WARDEN MARTINEZ,
MR. BOYLES, MR. AZUMA, MR. VAZQUEZ,
AND MS. C. CONCHAN,

Defendants.

ORDER ADOPTING REPORT AND RECOMMENDATION

On April 23, 2007, the pro se plaintiff, Jose Oscar Nino ("Nino"), filed this civil rights complaint pursuant to Bivens v. Six Unknown Named Agents of the Federal Bureau of Narcotics, 403 U.S. 388 (1971). On August 5, 2008, the defendants filed a Motion to Dismiss or, in the Alternative, Motion for Summary Judgment. On August 7, 2008, Magistrate Judge John S. Kaul entered a Roseboro notice informing the pro se plaintiff of his right to respond to the motion and also that failure to respond might result in the entry of summary judgment against him. Davis v. Zahradnick, 600 F.2d 458, 460 (4th Cir. 1979); Roseboro v. Garrison, 528 F.2d 309, 310 (4th Cir. 1975).

Nino asserts that he incurred a navel infection after a hernia operation at the Federal Medical Center in Alexander, Louisiana in June of 2004, that an operation is required to correct the problem, that the Bureau of Prisons has informed him that the operation will

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take place and that the operation has not taken place. Nino seeks the required surgery or transfer to a medical facility.

The defendants contend that Nino's Complaint should be dismissed because (1) it is moot because he received the surgery on August 25, 2007, following the filing of this action; (2) he has failed to exhaust his administrative remedies; and (3) there was improper service of process because he failed to serve a copy of the summons and complaint upon the United States Attorney for the Northern District of West Virginia and the United States Attorney General.

On December 1, 2008, in accordance with Local Rule of Prisoner Litigation 83.01, et seq, and 28 U.S.C. §§1915(e) and 1915A, Magistrate Judge Kaull filed a report and recommendation recommending that the defendant's Motion to Dismiss or, in the Alternative, Motion for Summary Judgment (dkt. no. 35) be granted to the extent that the defendants seek dismissal of the case as moot, and denied in all other respects. The Report and Recommendation informed Nino that failure to object to the recommendations in the report would result in the waiver of his appellate rights on this issue. On December 16, 2008, in lieu of an objection, the Court received a letter from Nino that stated "I'll let the Court do what it want to do because I have no help,

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to help me in this matter. So I'll lev [sic] it to Court to Ruld [sic]."¹

Therefore, the Court **ADOPTS** Magistrate Judge Kaull's Report and Recommendation in its entirety (dkt. no. 43), **GRANTS-IN-PART** and **DENIES-IN-PART** the defendant's motion to dismiss (dkt. no. 35), finds that the relief requested is **MOOT**, and **ORDERS** that this matter is **DISMISSED WITHOUT PREJUDICE** and stricken from the Court's docket.

The Court directs the Clerk to transmit copies of this Order to counsel of record and to the pro se plaintiff, certified mail, return receipt requested.

Dated: December 24, 2008.

/s/ Irene M. Keeley
IRENE M. KEELEY
UNITED STATES DISTRICT JUDGE

¹ Nino's failure to object to the Report and Recommendation waives his appellate rights in this matter and relieves the Court of any obligation to conduct a de novo review of the issue presented. See Thomas v. Arn, 474 U.S. 140, 148-153 (1985); Wells v. Shriners Hosp., 109 F.3d 198, 199-200 (4th Cir. 1997).